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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Implementation of the Local)
Competition Provisions in the)
Telecommunications Act of 1996)

CC Docket No. 96-98

DOCKET FILE COPY ORIGINAL

To: The Commission

OPPOSITION ON BEHALF OF AMERICAN ELECTRIC POWER
SERVICE CORPORATION, COMMONWEALTH EDISON
COMPANY, DUKE POWER COMPANY, ENTERGY
SERVICES, INC., NORTHERN STATES POWER
COMPANY, AND THE SOUTHERN COMPANY

TO

PETITION FOR CLARIFICATION OR
RECONSIDERATION OF
WINSTAR COMMUNICATIONS, INC.

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Dated: October 31, 1996

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EXECUTIVE SUMMARY

The Infrastructure Owners oppose the Petition for Clarification or Reconsideration of WinStar Communications, Inc. requesting that the Commission expand the scope of the Pole Attachments Act's nondiscriminatory access provision to include roofs and risers. WinStar's petition should be denied for two reasons. First, the Commission has no authority to expand the scope of a statute beyond what Congress enacted. Second, wireless equipment is not suitable for attachment on the infrastructure to which access is afforded, as WinStar concedes, and, accordingly is not covered by the Pole Attachments Act.

The Pole Attachments Act affords nondiscriminatory access to poles, ducts, conduits and rights-of-way owned or controlled by utilities and used for wire communications. By its express language, roofs and risers are not covered. The FCC cannot grant a right of access when Congress did not, as the Commission aptly held in its First Report and Order.

Moreover, wireless providers, such as WinStar do not fall within the scope of the statute at all. Their equipment does not constitute a "pole attachment" because it is not used for "wire communications." As WinStar's acknowledges, poles, ducts, conduits and rights-of-way used by wireline carriers are not suitable sites for wireless providers' equipment. Wireless providers' equipment, however, may be placed on many alternative sites -- none of which happen to fall within the scope of the Pole Attachments Act. While the FCC may sympathize with the

plight of the wireless carriers, it has no authority to do what Congress has not seen fit to do. Accordingly, WinStar's petition must be denied.

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SERVICE CORPORATION, COMMONWEALTH EDISON
COMPANY, DUKE POWER COMPANY, ENTERGY
SERVICES, INC., NORTHERN STATES POWER
COMPANY, THE SOUTHERN COMPANY AND
WISCONSIN ELECTRIC POWER COMPANY

TO

PETITION FOR CLARIFICATION OR
RECONSIDERATION OF
WINSTAR COMMUNICATIONS, INC.

American Electric Power Service Corporation, Commonwealth Edison Company, Duke Power Company, Entergy Services, Inc., Northern States Power Company, The Southern Company, and Wisconsin Electric Power Company (collectively referred to as the "Infrastructure Owners"), through their undersigned counsel and pursuant to Section 1.429(f) of the rules and regulations of the Federal Communications Commission ("FCC" or "Commission") submit this Opposition to the Petition for Reconsideration of the First

Report and Order, CC Docket No. 96-98, released August 8, 1996 (hereinafter "First Report and Order")^{1/} filed by WinStar Communications, Inc. ("WinStar"). Specifically, the Infrastructure Owners oppose WinStar's assertion that the Commission erred in finding that the Pole Attachments Act's provision for nondiscriminatory access to poles, ducts, conduits and rights-of-way owned or controlled by utilities does not encompass access to roofs and related riser conduit owned or controlled by utilities. Moreover, the Infrastructure Owners submit that wireless equipment, such as that used by WinStar, is not a "pole attachment" within the meaning of the Pole Attachments Act and, accordingly, WinStar has no right of access to utilities' poles, ducts, conduits, or rights-of-way, used in whole or in part for wire communications.

INTRODUCTION

1. The Infrastructure Owners are investor-owned electric or power utilities (or parents, subsidiaries or affiliates of electric or power utilities) engaged in the generation, transmission, distribution, and sale of electric energy.^{2/} The Infrastructure Owners own electric energy distribution systems that include millions of distribution poles and thousands of miles of conduits, ducts and rights-of-way, all of which are used

^{1/} First Report and Order, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, released August 8, 1996, 61 Fed. Reg. 45,476 (Aug. 29, 1996).

^{2/} A general description of each of the Infrastructure Owners is attached hereto as Appendix I.

to provide electric power service to millions of residential and business customers. To the extent those facilities are used for communications and the State in question has not preempted the FCC's jurisdiction, the Infrastructure Owners are subject to regulation by the Commission under the federal Pole Attachments Act, 47 U.S.C. § 224, as amended.^{3/} The Infrastructure Owners have a vital interest in, and are directly affected by, those portions of the Commission's First R&O addressing Section 224(f), access and denial of access to poles, ducts, conduits and rights-of-way, and Section 224(h), written notification of intended modifications to poles, ducts, conduits and rights-of-way.^{4/}

2. In its Petition for Reconsideration, WinStar asserts that the FCC should clarify that wireless carriers are entitled to access roofs and related riser conduit owned or controlled by utilities pursuant to Section 224(f)(1)^{5/}, which requires utilities to grant cable television systems and telecommunications carriers with nondiscriminatory access to poles, ducts, conduits and rights-of-way.^{6/} In essence,

^{3/} Some of the Infrastructure Owners provide energy service in states that have preempted the Commission's jurisdiction under Section 224 by making the certification required by 47 U.S.C. § 224(c)(2), and are therefore subject to state regulation of pole attachments. Nonetheless, because the federal statute serves as the loose "benchmark" on pole attachment and related issues, all of the Infrastructure Owners have a significant interest in the Commission's actions concerning such issues.

^{4/} The Commission's discussion of these issues is found in ¶s 1119-1240 of the First R&O.

^{5/} 47 U.S.C. § 224(f)(1).

^{6/} WinStar Petition for Reconsideration at 3-9.

WinStar's Petition asks the FCC to equate "poles, ducts, conduits, and rights-of-way" with "roofs and related riser conduit" or to expand the scope of the Pole Attachments Act to include these additional facilities.

3. As fully discussed below, WinStar's assertion that the Commission erred in failing to require utilities to provide access to roofs and riser conduit under the guise of the nondiscriminatory access provision of the Pole Attachments Act is wrong. As a matter of law, the Commission has no statutory authority to require utilities to provide access to roofs or related riser conduit.

ARGUMENT

I. The Commission Has No Statutory Authority to Require Utilities to Provide Access to Roofs and Related Riser Conduit

4. An agency construing a statute must be mindful of the two-step inquiry set forth by the Supreme Court regarding questions of statutory interpretation.^{2/} That inquiry is as follows:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue,

^{2/} Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984).

the question for the court is whether the agency's answer is based on a permissible construction of the statute.^{8/}

In determining whether Congress had an intention on the precise question at issue, Chevron indicates that "traditional tools of statutory construction," must be employed.^{9/} "[T]he first step in any statutory analysis, and [the] primary interpretive tool, is the language of the statute itself."^{10/} If that language is plain, then there is no room for alternative construction.^{11/}

Moreover, the expression of a discrete group of items creates an inference that all omissions are meant to be excluded.^{12/} In other words, where "Congress knows how to say something but chooses not to, its silence is controlling."^{13/} Finally, Courts presume that Congress is knowledgeable about existing law relevant to the legislation it enacts.^{14/} With respect to the

^{8/} Chevron, 467 U.S. at 842-43.

^{9/} ACLU v. Federal Communications Comm'n, 823 F.2d 1554, 1568 (D.C. Cir. 1987), cert. denied, 485 U.S. 959 (1988) (citing Chevron, 467 U.S. at 843 n.9).

^{10/} ACLU, 823 F.2d at 1568 (citing Landreth Timber Co. v. Landreth, 471 U.S. 681, 685 (1985) ("it is axiomatic that '[t]he starting point in every case involving construction of a statute is the language itself.'" (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975)); see also Wolverine Power Co. v. FERC, 963 F.2d 446, 449-450 (D.C. Cir. 1992)).

^{11/} Id.

^{12/} See Natural Resources Defense Council v. EPA, 976 F.2d 36, 41 (D.C. Cir. 1992).

^{13/} BFP v. Resolution Trust Corp., 511 U.S. 531, ___, 114 S. Ct. 1757, 1761 (1994).

^{14/} Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988); Washington Legal Foundation v. United States Sentencing Comm'n,

(continued...)

question of whether utilities must provide access to roofs and related riser conduits as part of Section 224(f)(1)'s nondiscriminatory access requirement, the intent of Congress is clear: the statute does not provide for, nor does the Commission have authority to require, utilities to provide access to roofs and related riser conduits.

5. As originally enacted, the Pole Attachments Act was designed to provide the then nascent cable television industry with access to the distribution poles of utilities, in an effort to foster the development of that industry. Congress intended access to be limited to poles, ducts, conduits and rights-of-way situated on and related to utilities' distribution networks.

6. As part of the Telecommunications Act of 1996^{15/}, Congress amended the Pole Attachments Act by adding a new nondiscriminatory access provision. That provision establishes utilities' obligations to provide access to a cable television system or any telecommunications carrier:

A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.^{16/}

^{14/} (...continued)

17 F.3d 1446 (D.C. Cir. 1994); see also Estate of Wood v. C.I.R., 909 F.2d 1155 (8th Cir. 1990) ("It is proper to consider that Congress acts with knowledge of existing law, and that absent clear manifestation of contrary intent, newly-enacted or revised statute is presumed to be harmonious with existing law and its judicial construction.").

^{15/} Pub. L. No. 104-104, 110 Stat. 56 (1996) ("the 1996 Act").

^{16/} 47 U.S.C. § 224(f)(1).

While Congress deliberately added a nondiscriminatory access provision, it did not similarly enlarge the scope of utility facilities to which access is afforded. To the contrary, Congress intentionally left the scope of the statute unchanged and limited to poles, ducts, conduits and rights-of-way. Congress did not include, and thus did not intend to include, roofs and riser conduit in the scope of the infrastructure covered by Section 224(f)(1). Thus, based on its plain language, the Pole Attachments Act encompasses only "poles, ducts, conduits, and rights-of-way."

7. While the intent of Congress to limit the scope of the Pole Attachments Act to distribution poles, ducts, conduits and rights-of-way is clear from the plain language of the statute, legislative history confirms this interpretation.^{17/} For example, in enacting the 1978 Act, Congress stated that:

The term "pole attachment" is defined to mean the attachment of the cables of a CATV system to a pole or occupation of a duct or conduit, or other right-of-way owned or controlled by a utility. Duct or conduit systems consist of underground reinforced passages for electric and communications facilities as well as underground dips, lateral members, hand holes, splicing boxes, or pull boxes.^{18/}

Nothing is said concerning roofs and related risers. This reference clearly establishes Congress's intent that, as the

^{17/} Because the 1996 Act's amendments did not change the type of utility infrastructure covered by the original 1978 Act, the legislative history of and decisions interpreting the scope of the 1978 Act are relevant. See, generally, Blum v. Stenson, 465 U.S. 886, 896 (1984).

^{18/} S. Rep. No. 580, 95th Cong. 1st Sess. 26.

plain language of the statute suggests, the Pole Attachments Act only applies to distribution poles, ducts, conduits and rights-of-way, not roofs and related risers. Finally, this interpretation is consistent with the prevailing understanding within the electric utility industry that the term "poles" means distribution poles only, "ducts" and "conduits" means underground ducts and conduits only, and "rights-of-way" is limited to public rights-of-way along distribution routes.

8. The FCC correctly rejected the assertion advanced by WinStar and others that the terms "poles, ducts, conduits, and rights-of-way" should be interpreted broadly to include virtually any "pathway" owned or controlled by the utility that a party seeking access deems is necessary to its provision of service, including roofs and related risers.^{19/} The Commission found that the intent of the 1996 Act is to allow "cable operators and telecommunications carriers to 'piggyback' along distribution networks owned or controlled by utilities, as opposed to granting access to every piece of equipment or real property owned or controlled by the utility."^{20/} The Commission properly confined its interpretation of the statute to the intent of Congress, as expressed in the plain, ordinary and commonly understood language of the Act.^{21/}

^{19/} First Report and Order, ¶ 1185.

^{20/} Id.

^{21/} As the Infrastructure Owners noted in their Petition for Reconsideration at 29, the Commission has an obligation to
(continued...)

9. In short, based on the plain language of the provisions at issue -- the starting point on questions of statutory construction -- it is clear that Congress has spoken on the precise question of whether the Pole Attachments Act requires access to roofs and related riser conduit. It does not; indeed, such a requirement is blatantly omitted, in contrast to the express requirement that utilities provide access to poles, ducts, conduits and rights-of-way owned or controlled by the utility.^{22/} The omission of roofs and risers from the express language of the Pole Attachments Act was intentional on Congress's part, not an oversight.^{23/} Thus, WinStar's Petition for Reconsideration must be denied for this reason alone.

II. Wireless Facilities Are Not Covered by the Pole Attachments Act

10. Apart from the fact that the facilities encompassed by the Pole Attachments Act do not include roofs and related risers, WinStar's Petition for Reconsideration is further based on the erroneous premise that wireless facilities themselves are covered by the Pole Attachments Act. As noted in their Petition

^{21/} (...continued)

construe the language of Section 224(f) narrowly as possible given the constitutional taking implications of that provision. See, e.g., Delaware, Lackawanna, & W. R.R. Co. v. Morristown, 276 U.S. 182, 192 (1928) ("[T]he taking of private property for public use is deemed to be against the common right and authority so to do must be clearly expressed.").

^{22/} 47 U.S.C. § 224(f)(1).

^{23/} See Natural Resources Defense Council v. EPA, 976 F.2d 36, 41 (D.C. Cir. 1992).

for Reconsideration, the Infrastructure Owners submit that the Pole Attachments Act only reaches equipment used by cable television systems and telecommunications carriers for wire communications.^{24/} Other types of facilities, including radio antennas, satellite earth stations, microwave dishes and other wireless equipment, are not covered by the statute.

11. Since its inception, the Pole Attachments Act has encompassed "pole attachments" by cable operators to a "pole, duct, conduit, or right-of-way owned or controlled by a utility."^{25/} A "utility" is, in turn, "any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications."^{26/} Although the 1996 Act expanded the scope of the statute to allow pole attachments by "telecommunications carriers" as well as cable operators, Congress did not make any further changes to the definition of "pole attachment" or "utility."

12. The term "pole attachment" in the Pole Attachments Act has referred to the stringing of coaxial cable along a

^{24/} Infrastructure Owners' Petition for Reconsideration at 26-29.

^{25/} 47 U.S.C. § 224(a)(4).

^{26/} 47 U.S.C. § 224(a)(1). The term "utility" does not include railroads or cooperatively or publicly owned utilities.

utility's distribution pole system.^{27/} Any other type of equipment has not been considered a "pole attachment." Indeed, where any other type of equipment, such as wireless, has been placed on a utility's infrastructure at all, it generally has been sited on facilities such as communications towers that are not covered by the statute. In practical terms, as WinStar concedes, utility poles, ducts, conduits or rights-of-way are unsuited for the placement of anything other than traditional coaxial or fiber cable facilities.^{28/} Moreover, although wire service facilities typically require distribution pole access to reach customer homes, again as WinStar concedes, wireless facilities have a wide range of options in terms of siting, such

^{27/} See, e.g., In the matter of Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, First Report, 9 F.C.C.R. 7442, 7555 (1994) ("Many cable operators lease space on utility poles in order to string wires and deliver programming. The contract between the cable operator and the owner of the pole is known as a 'pole attachment agreement.'"); In the Matter of Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, 4 F.C.C.R. 468 (1989) (emphasis added) (where the Commission stated that "[t]he cable television industry leases space on existing distribution poles owned by electric utilities and telephone companies to attach its coaxial cable and related equipment.").

^{28/} WinStar Petition for Reconsideration at 3 ("In practice, the rights of way utilized by WinStar's fiber based competitors chiefly include pole attachments as well as underground conduit and ducts, through which fiber optic cable is strung. In contrast, local exchange carriers such as WinStar that rely upon wireless microwave facilities have virtually no use for pole attachments or underground conduits or ducts, precisely because their transmission facility avoids the need for these conventional right of way obstacles.").

as buildings, rooftops, communications towers, or water towers.^{29/}

13. Congress did not amend the 1978 definitions of "pole attachment" or "utility" in the 1996 amendments to the Pole Attachment Act; neither should the FCC of its own initiative expand that definition. Congress must be deemed to have acted intentionally and with knowledge of the existing law.^{30/} Congress's intent is controlling.^{31/}

14. The placement of any type of equipment other than coaxial and fiber cable, including wireless equipment, on poles, ducts, conduits or rights-of-way raises a number of unique issues that clearly were not intended to be addressed by the Pole Attachments Act. There is nothing in the express language of the statute or its legislative history to support a contrary view. Accordingly, WinStar's Petition for Reconsideration should be denied.

^{29/} See, e.g., WinStar Petition for Reconsideration at 6 (requesting that the FCC clarify "WinStar's right to roofs and related riser conduits -- the true bottlenecks which impede wireless carriers' entry into local markets." Unlike the "push" Congress gave the cable television industry, Congress did not see a need to grant access by wireless companies to poles, ducts, conduits or rights-of-way because wireless facilities can be placed in many different locations.

^{30/} BFP v. Resolution Trust Corp., 511 U.S. 531, ___, 114 S. Ct. 1757, 1761 (1994).

^{31/} Chevron, 467 U.S. at 842-43.

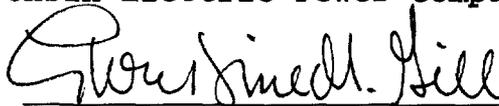
CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, American Electric Power Service Corporation, Commonwealth Edison Company, Duke Power Company, Entergy Services, Inc., Northern States Power Company, The Southern Company, and Wisconsin Electric Power Company, urge the Commission to deny the Petition for Reconsideration of WinStar Communications, Inc. and to proceed in a manner consistent with the views expressed herein.

Respectfully submitted,

American Electric Power Service Corporation, Commonwealth Edison Company, Duke Power Company, Entergy Services, Inc., Northern States Power Company, The Southern Company, and Wisconsin Electric Power Company

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Dated: October 31, 1996

APPENDIX I

INFRASTRUCTURE OWNER COMPANY DESCRIPTIONS

American Electric Power Service Corporation, a wholly-owned subsidiary of American Electric Power Co., Inc., is an organization which provides administrative, engineering, financial, legal and other services to the operating companies of American Electric Power Co., Inc. American Electric Power Co., Inc. is a public utility holding company registered under the Public Utility Holding Company Act of 1935, and holds all of the issued and outstanding common stock of the following companies: Appalachian Power Company, Indiana Michigan Power Company, Kentucky Power Company, Ohio Power Company, Columbus Southern Power Company, Kingsport Power Company, and Wheeling Power Company.

Commonwealth Edison Company ("ComEd") is an investor-owned public utility that supplies electricity to approximately 3.3 million retail customers in a service territory that includes roughly the northern one-third of Illinois and includes the city of Chicago and its suburbs. ComEd and its parent holding company, Unicom Corporation, are corporations organized and existing under the laws of the State of Illinois. ComEd is subject to the jurisdiction of the Illinois Commerce Commission as a public utility. ComEd also provides wholesale requirements service to several municipalities located in its service area. With respect to that service, as well as to coordination

agreements ComEd has with numerous other electric suppliers for the interstate transmission of energy, ComEd is subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC").

Duke Power Company ("DPC") supplies electricity to more than 1.7 million residential, commercial, and industrial customers in a 20,000 square-mile service area in North Carolina and South Carolina. DPC owns solely, or jointly, 1,772,732 electric distribution poles.

Entergy Services, Inc. is a subsidiary of Entergy Corporation, a public utility holding company organized pursuant to the provisions of the Public Utility Holding Company Act of 1935. Entergy Corporation owns all of the outstanding shares of common stock of the following five operating company subsidiaries: Entergy Arkansas, Inc. (formerly Arkansas Power & Light Company), Entergy Gulf States, Inc. (formerly Gulf States Utilities Company), Entergy Louisiana, Inc. (formerly Louisiana Power & Light Company), Entergy Mississippi, Inc. (formerly Mississippi Power & Light Company), and Entergy New Orleans, Inc. (formerly New Orleans Public Service, Inc.) (collectively, the "Entergy Operating Companies"). The Entergy Operating Companies engage in the manufacture, generation, transmission, distribution, and sale of electricity to more than 2.3 million retail customers throughout 112,000 square miles of Arkansas, Louisiana, Texas, and Mississippi. Entergy Services, Inc. provides engineering, transmission, distribution planning,

financial, human resource, tax, accounting, legal, and other services to the Entergy Operating Companies.

Northern States Power Company ("NSP"), headquartered in Minneapolis, Minnesota, is a major utility company with growing domestic and overseas non-regulated energy ventures. NSP and its wholly-owned subsidiary, Northern States Power Company-Wisconsin, operate generation, transmission, and distribution facilities providing electricity to about 1.4 million customers in Minnesota, Wisconsin, North Dakota, South Dakota, and Michigan. The two companies also distribute natural gas to more than 400,000 customers in Minnesota, North Dakota, and Michigan, and provide a variety of energy-related services throughout their service areas.

The Southern Company is the parent firm of five electric utilities: Alabama Power, Georgia Power, Gulf Power, Mississippi Power, and Savannah Electric. Other subsidiaries include Southern Electric International, Southern Nuclear, Southern Development and Investment Group, Southern Communications Services, Inc., and Southern Company Services.

The Southern Company supplies energy to a 120,000-square mile U.S. service territory spanning most of Georgia and Alabama, southeastern Mississippi, and the panhandle region of Florida -- an area with a population of about 11 million. Through its Southern Electric International unit, The Southern Company also supplies electricity to customers in a number of other states and in Argentina, England, Chile, the Bahamas, Trinidad, and Tobago.

CERTIFICATE OF SERVICE

I hereby Certify that on this 31st day of October 1996, I caused true and correct copies of the Opposition of American Electric Power Service Corporation, Commonwealth Edison Company, Duke Power Company, Entergy Services, Inc., Northern States Power Company, and The Southern Company to WinStar's Petition for Clarification or Reconsideration to be served via Hand-Delivery on:

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